

Hugh Powell, Esq; Plaintiff
in Error,

A G A I N S T

Our Sovereign Lord the
King, Defendant.

Upon an Information in Na-
ture of a *Quo Warranto*.

The C A S E of the Defendant in Error.

IN Hillary Term in the ninth Year of the Reign of his late Majesty, an Information, in Nature of a *Quo Warranto* was granted by the Court of *King's Bench* at *Westminster*, against the Plaintiff *Hugh Powell* of *Caslemaddock* in the Parish of *Llandeuvailog* in the County of *Brecknock*, Esq; for the said *Powell*, to shew by what Authority he claim'd to be a capital Burges and Common Council Man of the Borough of *Brecknock*, in the County of *Brecknock*, and why he claim'd all the Liberties, Privileges, and Franchises belonging unto the said Office of a Capital Burges and Common Council Man of the said Borough.

To which Information the Plaintiff in Error the said Term pleaded, and in his Plea sets forth as followeth, (*viz.*)

That the said Borough of *Brecon*, alias *Brecknock* is an ancient Borough, known and call'd as well by the Name of the Borough of *Brecon*, as by the Name of the Borough of *Brecknock*, and that the Burgeses of the said Borough Time immemorial, unto the 20th Day of *March*, in the second and third Year of the Reign of King *Philip* and Queen *Mary*, were a corporate Body, and in divers Times known and call'd by the several Names of Burgeses of the Town of *Brecon*, Burgeses of the Borough of *Brecon*, and Bailiffs and Burgeses of the Borough of *Brecon*, and that all the Time aforesaid, and hitherto, there were, and as yet are within the said Borough Burgeses of the said Borough, which Burgeses of the said Borough from Time to Time, and all Times during the Time aforesaid, and hitherto, were eligible, and were elected out of the most substantial Persons inhabiting as well within as without the said Borough; and the said Plaintiff in his said Plea further sets forth, that the said *Philip* and *Mary*, late King and Queen of *England*, by their Letters Patents under the Great Seal of *England*, bearing Date the said 20th of *March* in the said second and third Year of their Reign, reciting, among other Matters, That their Borough of *Brecknock* in *South Wales*, was an ancient incorporated Borough, and that the Inhabitants thereof and their Predecessors Inhabitants of the said Borough, have enjoy'd within the said Borough, divers Liberties, Privileges, Jurisdictions, and Customs which their said Subjects, then Inhabitants of the said Town, and their Predecessors hitherto had and held, and that the said King and Queen for themselves, and the Heirs and Successors of the said Queen, did order, constitute, and grant that the said Borough of *Brecon* should be and remain always for the future a Borough of itself, and that the Burgeses of the said Borough from thenceforth always for the future should be and remain one Corporate and Politick Body, by the Name of Bailiff, Aldermen and Burgeses of the Borough of *Brecon* and that there should be in the said Borough one Bailiff and two Aldermen, and that there should be in the said Borough fifteen Men of the most substantial and most discreet Burgeses of the said Borough (whereof the said Bailiff and two Aldermen to be three) who should be call'd and nam'd Capital Burgeses, and Counsellors of the said Borough, and who from thenceforth should be a Common Council of the said Borough, and that all the aforesaid fifteen Capital Burgeses, not being Bailiff or Aldermen of the said Borough, from Time to Time should be aiding and assisting to the Bailiff and Aldermen of the said Borough for the Time being, in all Matters and Causes, touching or concerning the said Borough; and the said Plaintiff in his Plea further sets forth, That the said King and Queen did further order, that whenever it should happen that any of the said fifteen capital Burgeses or Counsellors of the said Borough for the Time being, should die or be removed from their said Places, that then, and so often it should be lawful for the other remaining and surviving Capital Burgeses and Counsellors, or the Major Part of them, to nominate and elect other or others out of the Burgeses of the said Borough, into the Place and Office of those Capital Burgeses or Counsellors so happening to die or be remov'd; and that he or they being so elected and chosen, and having taken his or their Corporal Oath before the Mayor and Aldermen of the said Borough, well and faithfully to execute the said Office, shall be of the Number of the said fifteen Capital Burgeses or Counsellors of the said Borough; and the said Plaintiff in his said Plea further sets forth, That the said late King and Queen did further grant unto the said Bailiff, Aldermen and Burgeses of the said Borough and their Successors all other lawful Liberties and Franchises, which the Burgeses had before enjoy'd under any Name of Incorporation, by Virtue of any Letters Patents of the said late King and Queen or any of their Predecessors, or by any other lawful Right, Custom, Prescription, or Title; and the said Plaintiff in his said Plea further sets forth, That on the 27th Day of *September*, in the seventh Year of the Reign of the late Queen *Anne*, he being one of the Burgeses of the said Borough, duly elected and chosen, was, at the said Borough on the said 27th Day of *September* by the Major Part of the Capital Burgeses and Counsellors of the said Borough, being duly assembled, duly elected and chosen into the Place and Office of a Capital Burges and Counsellor of the said Borough, being then vacant, and being so elected and chosen as aforesaid, he took his Corporal Oath before the Bailiff and Aldermen of the said Borough, well and faithfully to execute the said Office, and was thereupon admitted therein, and by

Reason

March 20, 2d
and 3d of *Phi-*
lip and *Mary*,
Charter.

Sept. 27, 7th
of *Anne*, elect-
ed Capital
Burges and
Counsellor.

Reason of which the said Plaintiff became, and as yet is one of the Capital Burgeses and Counsellors of the said Borough, and that by that Authority he has from the Time mention'd in the said Information claim'd us'd, and exercis'd the said Office, and yet doth claim, use, and exercise the same, together with all the Liberties and Privileges thereunto belonging.

Replication.

To which Plea the King's Coroner has reply'd, protesting, That the Burgeses of the Borough aforesaid, from Time to Time, and at all Times throughout the whole Time mention'd in the Plaintiff's Plea, were not eligible, nor were elected out of the most substantial Persons inhabiting, as well within as without the said Borough, but for Plea doth reply, and say, that the Plaintiff did not take his Corporal Oath, well and faithfully to execute the said Office of Capital Burges and Counsellor of the said Borough before the Bailiff and Aldermen thereof, as he has let forth in his said Plea, and thereupon an Issue is join'd, and in the Replication it is admitted that the said King *Philip* and Queen *Mary* did make such Grant as set forth in the Plaintiff's Plea; but the said Defendant doth say that the said King *Philip* and Queen *Mary* have by their said Letters Patents granted to the said Bailiff, Aldermen, and Burgeses of the said Borough of *Brecknock*, that the Bailiff, Aldermen, and Common Council of the said Borough should have Power to make Freemen out of the Inhabitants of the said Borough from Time to Time, and to bind them by an Oath to be obedient and observant to the Bailiff, Aldermen and Burgeses of the said Borough for the Time being, in all lawful Matters and Things whatsoever: And the said Replication doth further set forth that the said King and Queen by their said Letters Patents did further grant, that no Inhabitants there whatsoever should claim any Liberties or Franchises whatsoever, unless he were continually resident and conversant within the said Borough, which said Letters Patents of the said King and Queen the said Burgeses and Inhabitants of the said Borough the Day and Year aforesaid did accept; and the said Replication doth also further set forth, that the Place and Office of a Freeman of the said Borough, and the Place and Office of a Burges of the said Borough are one and the same Office, and not different, and that the said Plaintiff never was an Inhabitant of the said Borough, and then traverses that the Plaintiff in Error at the Time of his said pretended Election into the Place of a Capital Burges and Counsellor of the said Borough was a Burges of the said Borough.

To which Replication of the Defendant the Plaintiff doth rejoin, and in his Rejoinder doth say, that at the Time of his Election into the Place and Office of one of the Capital Burgeses and Counsellors of the said Borough, he was one of the said Burgeses of the said Borough, as he had before in his Plea alledged, and thereupon an Issue is enjoin'd.

Special Verdict.

Which Issues were try'd before Mr. Justice *Price* at *Hereford* Assizes in *March*, 1724, and the Jury upon the Trial found their Verdict specially, as followeth, (*viz.*)

That the Borough of *Brecknock* is an ancient Borough, and anciently known as well by the Name of the Borough of *Brecon*, as by the Name of the Borough of *Brecknock*, and that the Borough of *Brecon* and Borough of *Brecknock* are one and the same Borough, and that King *Philip* and Queen *Mary*, late King and Queen of *England* by their Letters Patents under their Great Seal of *England*, bearing Date the 20th Day of *March*, in the second and third Year of their Reign, reciting, among other Matters, that whereas their Borough of *Brecknock* in *South Wales* was an ancient incorporated Borough, and that the Inhabitants thereof and their Predecessors, their beloved Subjects, then Inhabitants of the said Borough, had enjoy'd within the said Borough divers Liberties, Privileges, Jurisdictions, and Customs which their said Subjects then Inhabitants of the said Town and their Predecessors hitherto had and held; and that the said King and Queen for themselves, their Heirs and Successors did ordain, constitute, and grant that the said Borough of *Brecon* should be and remain always for the future a Borough of itself, and that the Burgeses of the said Borough from thenceforth always for the future should be and remain by Virtue of the said Letters Patent one Corporate and Politick Body by the Name of Bailiff, Aldermen, and Burgeses of the Borough of *Brecon*, and should have all lawful Liberties, Privileges, Franchises, and Jurisdictions which the Burgeses had before enjoy'd by Virtue of any Charter of Incorporation or lawful Usage; and that there should be in the said Borough one Bailiff and two Aldermen, and that there should be also in the said Borough fifteen Men of the most substantial and most discreet of the said Borough (whereof the Bailiff and Aldermen to be three) who should be called and named Capital Burgeses and Counsellors of the said Borough, and who from thenceforth should be a Common Council of the said Borough; and that the aforesaid Capital Burgeses and Counsellors of the said Borough, not being Bailiff nor Aldermen of the said Borough from Time to Time should be aiding and assisting to the Bailiff and Aldermen of the said Borough in all Matters and Causes touching and concerning the same; and the said King and Queen by their said Letters Patents do further grant to the said Bailiff, Aldermen, and Burgeses, and their Successors, That the Bailiff, Aldermen, and Common Council for the Time being, or the Major Part of them being assembled in Court or Convocation, should have full Authority and Power of ordering and constituting from Time to Time such Laws, Institutes, Orders, and Constitutions which to them, or the Major Part of them, according to their Discretions should seem to be good, wholesome, honest and necessary for the good Rule and Government of the Bailiff, Aldermen, and Capital Burgeses, and all and singular the other Burgeses of the said Borough, and of all the Officers, Ministers, Artificers, Inhabitants, and Residents whatsoever of the said Borough for the Time being, and that whensoever it should happen that any of the said fifteen Capital Burgeses or Counsellors of the said Borough should die or be amoved from their Places, that then it should be lawful for the other surviving or remaining Capital Burgeses or Counsellors, or the Major Part of them, to elect, nominate, appoint and chuse other or others of the Burgeses of the said Borough into the Place or Places of such Capital Burges or Burgeses so happening to die, or be amov'd, and that he or they so being elected and chosen, should take his Corporal Oath before the Bailiff and Aldermen of the said Borough, well and truly to execute the said Office, and that they should be of the Number of the aforesaid Capital Burgeses or Counsellors of the said Borough, and that this should be done so often as the Case should happen; and the said King *Philip* and Queen *Mary* by their said Letters Patents for themselves and their Successors, did grant to the said Bailiff, Aldermen, and Burgeses of the said Borough of *Brecknock*, that the Bailiff, Aldermen, and Common Council of the said Borough should have Power to make Freemen out of the Inhabitants of the said Borough from Time to Time, and to bind them by an Oath to be obedient and subservient to the Bailiff, Aldermen, and Burgeses of the said Borough for the Time being, in all lawful Matters and Things whatsoever; and by their said Letters Patents they did further grant, That

That no Inhabitant there whatsoever should claim any Liberties or Franchises whatsoever, and he were continually resident and conversant within the said Borough; and the Jury further find, that the Burgeses and Inhabitants of the said Borough of *Brecon*, alias *Brecknock*, the said Letters Patents did accept, and that the Place and Office of a Freeman of the said Borough and the Place and Office of a Burges of the said Borough are one and the same Office, and not different; and the Jury further find, that from the making and granting of the said Letters Patents, the Oath hereafter mention'd, intituled the Oath of a Burges or Freeman within the Town of *Brecknock*; and which followeth in these Words, *viz.* "First, you shall swear that from henceforth you shall bear Faith and true Allegiance to the King's Majesty that now is, his Heirs and lawful Successors. You shall be obedient to the Bailiff, Recorder, and Aldermen of this Town, in all their lawful Commandments. This Town, and the Franchises and lawful Customs, you shall maintain, save, and keep harmless to your Power and Industry. You shall be contributing to all Manner of Charges within this Town, as Summons, Watches, Contributions, Taxes, Tallages, Lot and Scot, and all other Charges, bearing your Part as a Burges and Freeman ought to do. You shall know no Foreigner to buy or sell any kind of Merchandize, with any other Foreigner, within this Town, or the Franchises thereof, contrary to the Statute against Forestalling, Regrating, and Ingrossing, but you shall warn the Bailiff, Aldermen, and Chamberlains, of the said Town, thereof, without Delay. You shall take no Apprentice but such as you may justify by the Laws of this Realm of *England*; and for no less Term than for seven Years. You shall keep the King's Majesty's Peace within the said Town, to the best of your Power. You shall presently repair, with your Staff, Sallet, or other Weapon, to the Officers of this Town, upon the ringing of a Bell, or other Notice given unto you for that Purpose, when any Fray, or other Outrage, is made, committed, or offered, or like to be made, committed, or offered, against the Peace, and do your Endeavour, with the said Officers, to appease the same, and to apprehend all Felons, Murtherers, and Traytors. And in all other Things behave yourself as a true and lawful Burges ought to do. So help you God." Was taken by every common Person, admitted into the Place or Office of a Burges or Freeman of the said Town; and that the Clause or Paragraph only following, *viz.* "First you shall swear, that from henceforth you shall bear Faith and true Allegiance to the King's Majesty that now is, his Heirs and lawful Successors. You shall be obedient to the Bailiff, Recorder, and Aldermen, of this Town, in all their lawful Commandments. This Town, and the Franchises and lawful Customs you shall maintain, save, and keep harmless, to your Power and Industry; and in all other Things behave yourself as a true and lawful Burges ought to do. So help you God." And that no other Part of the said Oath was, throughout the Time aforesaid, taken by every Gentleman admitted into the Place or Office of a Burges or Freeman of the said Borough. And the Jury further find, that the said *Hugh Powell*, the Plaintiff in Error, being a Gentleman, on the 29th Day of *September*, in the 6th Year of the Reign of the late Queen *Ann*, and long before, and continually afterwards, hitherto lived at *Castlemaddock*, in the Hundred of *Mirthir*, four Miles from the said Borough, and out of the said Borough. And that the said *Hugh*, the Plaintiff, living in *Castlemaddock* aforesaid, on the said 29th Day of *September*, in the said Sixth Year of the Reign of the late Queen *Ann*, was chosen, by the then Bailiff, Aldermen and Common Council of the said Borough (duly assembled) into the Place and Office of a Freeman or Burges of the said Borough of *Brecon*. And that, on the 21st Day of *May*, 1708, at the Borough aforesaid, before the then Bailiff, Aldermen, and Common Council of the said Borough (being duly assembled) he took the Clause, or Paragraph of the said Oath, intituled, *The Oath of a Burges or Freeman*, before-mentioned, which was usually administered to Gentlemen, in Manner and Form aforesaid; and that he was thereupon admitted to be a Burges of the said Borough. And the Jury further find, that the said *Hugh Powell*, the Plaintiff in Error, on the 27th Day of *September*, 1708, aforesaid, at a Chamber held at the said Borough, in and for the said Borough, the said 27th of *September*, in the Year aforesaid, by the Bailiff, Aldermen, and major Part of the capital Burgeses and Counsellors of the said Borough, then and there being duly assembled, was named and elected into the Place of a Capital Burges, or Counsellor of the said Borough; and that he took his Oath before the Bailiff and Aldermen of the said Borough, for the due Execution of the Office of a Capital Burges of the said Borough; and that thereupon he was admitted into the said Office of a Capital Burges or Counselor of the said Borough. And that the said *Hugh Powell*, the Plaintiff in Error, after that Time, in two several Years, was twice elected, chosen, and sworn, into the Office of Bailiff of the said Borough of *Brecon*; and throughout the said Years respectively he exercised the said Office of Bailiff of the said Borough. And the Jury further find, that from the 15th Year of the Reign of Queen *Elizabeth*, and continually hitherto, without Interruption, it was usual, within the said Borough, to elect, nominate, and chuse, Freemen or Burgeses of the said Borough, out of Men inhabiting as well without as within the said Borough; and that such Persons, inhabiting without the said Borough, and being elected and chosen into the said Place or Office of a Burges of the said Borough, throughout the whole Time aforesaid, agreeably, did exercise the aforesaid Place and Office of a Burges of the said Borough. And then the Jury make the general Conclusion.

Which special Verdict being argued before the Court of *King's-Bench*, in *Michaelmas* Term 1727, the said Court were pleas'd to give Judgment of Ouster against the Plaintiff in Error; and that the Relator should recover Costs against him, by the Statute of the Ninth of Queen *Anne*. Whereupon the said *Hugh Powell* has brought a Writ of Error, and assign'd the general Errors.

The only Question in this Case is, whether the Plaintiff in Error was a Burges at the Time of his pretended Election to be a Capital Burges or Counsellor, or not?

If he was not, he was incapable of being elected a Capital Burges or Counsellor, the Charter having directed the Choice of such Officers to be out of the Burgeses.

Since the Acceptance of the Charter, no one can be a Burges unless his Election into that Office can be warranted by the Charter: Now it plainly appears that the Plaintiff in Error was not capable of being a Burges, not being an Inhabitant of the said Borough, which is a necessary Qualification; for 'tis expressly required by the Charter, that the Burgeses should be chosen out of the Inhabitants of the said Borough.

Objection.

But 'tis objected, that notwithstanding the Words of the Charter are so, yet that the Usage has been to elect Burgeses that live out of the Borough.

Answer I.

No Usage can be sufficient to establish a Right, but an immemorial Usage, which does not appear to be the present Case; for this Usage is only from the 15th Year of Queen *Elizabeth*, which is not such a Usage as will establish a Right.

Supposing

Answer II.

Supposing this could be taken to be such a Usage as would amount to a Prescription, yet when a Charter has been accepted, which directs an Election inconsistent with such a Usage, as in the present Case, the Elections of Burgesses are confin'd to be out of the Inhabitants, the Prescription, inconsistent with the Charter, can no longer subsist; but the Prescription is determin'd by Acceptance of the Charter, and the Charter must afterwards be the only Measure by which the Election of Burgesses are to be govern'd.

Corporations are merely Creatures of the Crown, and where they subsist under Charters they must be govern'd and guided by such Rules and Directions as are thereby prescribed; and therefore when any Charter has directed (as in the present Case) that certain Members are to be elected out of Persons under any particular Description, those, and no others, are capable of being elected; and though in some Corporations, Practices inconsistent with the Rules prescribed by the Charters may have long prevail'd, yet they are no better than so many Instances of Usurpations upon the Crown; and such a wrongful Practice can no more create a Right, contrary to the Words or Directions of a Charter, than the first Instance of that Kind after the Acceptance of the Charter could be legal; and it would be difficult to maintain, that the first Election, after the Acceptance of a Charter, of a Person not within the Description of it was legal; and if it was not, it would be equally difficult to fix upon any Period of Time when first such a Practice would begin to be legal.

Wherefore, and for many other Reasons, it is pray'd that the Judgment of the Court of King's-Bench may be affirm'd.

Tho. Reeve.
N. Fazakerley.

Hugh Powell, Esq; Plaintiff in
Error,

AGAINST

Our Sovereign Lord the King
Defendant.

The CASE of the
Defendant in Error.

To be Argued at the Bar of the House
of Lords, on Monday the Third Day
of March, 1728.